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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

MICHELLE HINDS, an individual, and TYRONE) Case No.: 4:18-cv-01431-JSW (AGT)
POWELL, an individual,)

Plaintiffs,)

vs.)

FEDEX GROUND PACKAGE SYSTEM, INC.,)
corporation; BAY RIM SERVICES, INC., a)
corporation; and Does 1 through 25, inclusive,)

Defendants.)

**Plaintiffs' Supplemental Opposition to
Motion in Limine No. 4**

Judge: Honorable Jeffrey S. White
Department: 5

Re: Dkt. No. 222, 239

1 FedEx Ground's motion *in limine* no 4 seeks to "preclude Plaintiffs from offering evidence of
2 DOT compliance solely to prove joint employment, from arguing that compliance with DOT
3 regulations is evidence of joint employment, and from attributing DOT regulations to 'FedEx Ground
4 requirements of control.'" Dkt. 222 at 7:7:2325. This court has ordered the Plaintiffs to file a
5 supplemental opposition to this motion. Dkt. 239. In particular, this court has ordered the Plaintiffs
6 to specify the provisions of the Bay Rim ISP Agreement (ISPA) upon which they intend to rely and
7 to explain why those provisions are relevant. *Id.* at 1:17-19.

9 At the threshold, Plaintiffs interpret this order as limited to specifying those ISPA provisions
10 in which FedEx Ground requires Bay Rim to comply with DOT regulations. This interpretation
11 excludes those ISPA provisions in which FedEx Ground requires something of Bay Rim that is
12 completely unrelated to DOT regulations. For example, FedEx Ground requires Bay Rim to take a
13 corporate business form (ISPA, §6.1, at FXG_5) and to hire employees rather than independent
14 contractors (*Id.*, §6.2, at FXG_5). These types of requirements are not addressed in this brief.

16 **The *Moreau* Principle.**

17 In *Torres-Lopez v. May*, 111 F.3d 633, 642 (9th Cir. 1997), the Ninth Circuit explicitly held
18 that a farm owner exercised indirect supervisory control over the farmworkers employed by a labor
19 contractor when the farm owner exercised his contractual right to inspect the work of the
20 farmworkers. Following *Torres-Lopez*, the Ninth Circuit in *Moreau v. Air France*, 356 F.3d 942,
21 950-951 (9th Cir. 2003) found that an airline's specification of performance standards to its service
22 company and its communication of complaints to service company supervisors might constitute
23 indirect supervision of the service companies' employees. The Ninth Circuit found it "noteworthy,"
24 however, that this indirect supervision was for the purpose of ensuring compliance with safety and
25 security regulations, thus rendering it "qualitatively different" from the supervision exercised by the
26 farm owner in *Torres-Lopez*. *Id.* The *Moreau* court then equivocated whether the airline's actions
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1 actually did constitute supervisory control over the service company's employees. *Id.*

2 In *Johnson v. Serenity Transportation, Inc.*, 2017 WL 1364112, at *8 (N.D. Ca. April 14,
3 2017), the Northern District summarized the application of "the *Moreau* principle," distinguishing
4 between (a) governmental regulations that require an entity to supervise generally and (b)
5 governmental regulations that require an entity to supervise through a "particular method of action,"
6 with the former, but not the latter, evidencing supervisory control. With this background, let us turn
7 to the pertinent provisions of the ISPA.
8

9 ISPA Provisions.

10 ISPA §6.4(F) prohibits Bay Rim from assigning drivers to operate vehicles unless they meet
11 the driver standards specified in Schedule I. ISPA at FXG_7, FXG_66-74.

12 1. ISPA Schedule I, §1.1(A).

13 ISPA Schedule I, §1.1(A) requires Bay Rim drivers to have at least six months of CMV
14 driving experience. ISPA at FXG_66. However, the pertinent DOT regulation, 49 C.F.R. 391.11,
15 does not require any such minimum driving experience. Thus, FedEx Ground imposes on drivers a
16 requirement that is stricter than that imposed by the DOT, thereby evidencing indirect supervisory
17 control.
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19 2. ISPA Schedule I, §1.1(B) and §3.

20 ISPA Schedule I, §1.1(B) and §3 empowers FXG to investigate drivers, purportedly in
21 compliance with 49 CFR 391.23. ISPA at FXG_66, FXG 71. This regulation authorizes an
22 investigation of a driver's licensing and safety information for a period of *three* years. But ISPA §3
23 prohibits Bay Rim from assigning drivers who were convicted of various criminal offenses during the
24 previous *ten* years. Thus, the general investigatory provisions of 49 CFR 391.23 do not authorize this
25 ten-year, rather than a three-year, restriction on a driver's ability to work.
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1 **3. ISPA Schedule I, §1.3.**

2 ISPA Schedule I, §1.3(A)-(Q), purports to implement the requirements of 49 CFR 383.51
3 relating to the disqualification of new drivers who have committed enumerated offenses. ISPA at
4 FXG_67-68. As an example, the ISPA disqualifies new drivers who refused during the previous *five*
5 years to take a required alcohol test. ISPA at FXG_67. But 49 CFR 383.51 disqualifies such drivers
6 who refused only during the previous *one* year (first offense). *Cf. id.*, Sched. 8, §1.3 with 49 C.F.R.
7 383.51(b). Thus, the regulation does not require the draconian five-year restriction imposed by
8 FedEx Ground.
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10 **4. ISPA Schedule I, §1.4.**

11 ISPA Schedule I, §1.4(A)-(W), purports to implement the requirements of 49 CFR 383.51
12 relating to the disqualification of existing drivers who commit enumerated offenses. ISPA at
13 FXG_69-70. For some provisions, this disqualification is permanent; for some, the disqualification is
14 for a lesser period, usually three years. *Id.* For all offenses, the duration of the disqualification in the
15 ISPA exceeds the requirements imposed by the regulation. For example, the ISPA disqualifies an
16 existing driver who refuses to take a required alcohol test (first conviction) forever. ISPA at
17 FXG_68. The regulation, however, disqualifies the driver for just one year. 49 CFR 383.51(b).
18 Thus, FXG is exercising an indirect control over which drivers can be assigned to routes.
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21 **5. ISPA Schedule I, §1.7.**

22 Moreover, ISPA Schedule I, §1.7 permits FedEx Ground to unilaterally disqualify any driver
23 that it believes may have committed any of the offenses described above until the driver has been
24 cleared by a court of law. ISPA at FXG_71. No DOT regulation sanctions this control.
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26 **6. ISPA Schedule I, §2.**

27 This section cites 49 CFR 392.60 as authority for prohibiting the transport of unauthorized
28 persons. ISPA at FXG_71. But there is no regulation at 49 CFR 392.60.

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